IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 8, 2004 Session

IN RE: THE ESTATE OF SHERMAN FETTERMAN v. JOHNNY KING

Direct Appeal from the Circuit Court for Scott County
No. 5229 Hon. William Lantrip, Judge

No. E2003-02081-COA-R3-CV - FILED AUGUST 26, 2004

The Trial Court awarded Estate Judgment for attorney's fees based on Decedent's contingency fee contract with Defendant. On appeal, we vacate and remand to establish fees under the theory of quantum meruit.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Vacated.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and WILLIAM H. INMAN, SR.J., joined.

Johnny V. Dunaway, LaFollette, Tennessee, for Appellant.

Ronald L. Grimm, Knoxville, Tennessee, and George H. Buxton, Oak Ridge, Tennessee, for Appellees.

OPINION

In this action, the determinative issue on appeal is the amount of attorney's fees owing to the Estate of a deceased lawyer by defendant, a client of the deceased.

Following trial, the Trial Judge essentially enforced a written Contract of Employment between the parties, and awarded the Estate $800,000.00 plus pre-judgment interest. The agreement enforced by the Trial Court provides in pertinent part:

> That Johnny King engaged the services of Sherman Fetterman, attorney at

> law, in relation to the acquisition of certain properties; to negotiate with state agents; and to represent the interests of Johnny King, et al., before other governmental bodies, and in any other capacity required, all for the purpose of establishing a solid waste disposal facility (landfill).
>
> That Johnny King and Sherman Fetterman, aforementioned, agreed in lieu of compensation for legal services rendered to Johnny King, that Johnny King shall provide to Sherman Fetterman an ownership interest of any company or partnership, or corporation, public or private, formed for the purposes of establishing a sold waste disposal facility (landfill).

Additionally, the parties agreed that Sherman Fetterman would function as attorney for any organization or business formed, as aforementioned. The Agreement provides:

> The ownership interest of Sherman Fetterman shall be twenty percent (20%), and said ownership interest shall be evidenced by stock certificates in the event a corporation is formed; or proper documentation acknowledged the ownership interest in the event a partnership or non-incorporated company is formed.

The document was signed by Sherman Fetterman and Johnny King, on September 22, 1990.

The record establishes that the deceased and defendant entered into an attorney/client relationship beginning in 1987,[1] and the attorney provided legal services in efforts to acquire property, negotiating with state agencies and governmental bodies, to the end of establishing a sanitary landfill or a disposal facility in Scott County, Tennessee. The attorney's efforts were initially undertaken with the agreement to obtain a 10% interest in any business entity that might be formed to establish such a landfill or disposal facility, but in January of 1989 Fetterman wrote defendant King, advising that he would not further represent King in these matters until the terms of his representation were "renegotiated", which apparently led to the fee arrangement set forth in the quoted contract.

Fetterman's efforts to obtain a permit for a landfill were unsuccessful, but he filed a lawsuit on defendant's behalf against Scott County on March 9, 1990. After the County filed a Motion to Dismiss on March 26, 1990, a voluntary non-suit was entered in return for the County's withdrawal of its Motion to Dismiss and/or for Summary Judgment. Defendant then employed George P. Dillard, an Atlanta attorney, and J. Douglas Overbey, a Knoxville attorney, to pursue the action against Scott County, and they filed an action on defendant's behalf against Scott County and the town of Winfield, as defendants. Subsequently, these attorneys asked Fetterman to serve as local counsel, which he accepted.

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[1]Deceased graduated from The Nashville School of Law and was licensed to practice law in the State of Tennessee in 1987.

Fetterman accepted a position as a full time attorney in the Public Defender's Office in 1992.[2] Defendant Scott Waste Disposal Company was chartered in 1995, and the State granted a landfill permit to Scott Waste Disposal Company on April 29, 1997. On September 23, 1998, defendant sold his stock in Scott Waste Disposal Company to Liberty Waste Services of Tennessee, Inc., for four million dollars.

The Trial Court heard evidence from the Estate that defendant owed the Estate $250,000.00 for the deceased's legal services, in addition to the contractual fee of 20% of the stock in the landfill company. The Court also heard evidence from defendant that shortly prior to Fetterman's death on October 27, 1997, that defendant and Fetterman had agreed to settle all of Fetterman's claim for legal fees for $250,000.00.

The Estate offered the expert testimony of James Webster, an attorney, who opined that the contractual fee was reasonable. He testified that he based his judgment on examining boxes of documents that the deceased's daughter had compiled relating to the landfill matter and Johnny King, as well as interviewing people in Scott County about the matter and reading newspaper articles.

The Trial Court declined to award the additional $250,000.00 claimed by the Estate, and refused to find the deceased had agreed to accept $250,000.00 as payment for all of his legal services. The evidence does not preponderate against the Trial Court's finding on these issues. Tenn. R. App. P. 13(d). The Trial Court then found the contractual fee to be reasonable, and entered Judgment for the Estate based on the Contract.

Defendant appealed and raises these issues:

1. Did the Trial Court err in failing to find a novation of the 20% agreement?

2. Did the Trial Court err in finding the attorney's fee based on the 20% contract was reasonable?

3. Did the Trial Court abuse its discretion in denying appellant's Rule 60 motion and failing to order a new trial?

4. Did the Trial Court abuse its discretion in refusing to hear testimony from newly discovered witnesses?

The Estate raised an issue of whether the Trial Court erred in altering the judgment by recalculating the award of prejudgment interest?

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[2]A public defender is prohibited from practicing law, but is allowed a reasonable time to conclude or transfer his cases. Tenn. Code Ann. § 8-14-202(B)(c).

King insists that his agreement with Fetterman to pay $250,000.00 as settlement of Fetterman's fee was a novation of their earlier 20% agreement. Fetterman's Estate argues that the theory of novation was not placed in issue at the trial court level. While it is true the word "novation" does not appear in the Answer filed by King, King had from the earliest pleadings maintained that the $250,000.00 fee was a complete "settlement" of all that he owed Fetterman, and this was his position at trial as well. While settlement and novation are not the same legal concept, they are similar, and King's counsel clearly argued in his closing argument that the later agreement for $250,000.00 was a novation of the earlier 20% agreement. However, the issue of whether or not King and Fetterman actually reached this agreement and what it was to be in payment of was the issue at trial. But the question of novation was obviously tried by implication, and the estate's argument that this was not properly before the trial court is without merit. *See, e.g., Fahrner v. SW Manufacturing, Inc.*, 48 S.W.3d 141 (Tenn. 2001); *Lively v. Drake*, 629 S.W.2d 900 (Tenn. 1982). *Also see, Blaylock v. Stephens*, 258 S.W.2d 779, 781 (Tenn. Ct. App. 1953)(citations omitted). As this Court has explained: "novation must be clearly established by evidence of the discharge of the original debt by express agreement or by the acts of the parties clearly showing the intention to work a novation". *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 89 (Tenn. Ct. App. 1988). King concedes in his brief, the intention of the parties that a subsequent agreement is to extinguish a prior agreement must be clear and definite. *Jetton v. Nichols*, 8 Tenn. App. 567 (1928).

The evidence on this issue consisted of King's testimony that Fetterman agreed to accept $250,000.00 in full payment of all amounts owed to him by King. There was also testimony of Mrs. King and Mr. Terry, who claimed to have heard Fetterman tell King he would accept $250,000.00, but there was no discussion regarding whether this was in addition to or in lieu of the 20% agreement. It was King's burden to prove that a novation occurred.

In this case, there was no clear and definite expression of the parties' intent to extinguish the 20% agreement. Moreover, King's proof on this issue was not credited by the Trial Court, and the Trial Court's finding as to credibility will not be disturbed on appeal. *See Massengale v. Massengale*, 915 S.W.2d 818 (Tenn. Ct. App. 1995). We conclude the issue as to a novation is without merit.

The Trial Court awarded Fetterman's estate 20% of the sale price of the corporation, or $800,000.00, based on the 20% agreement. The Court found that the fee was reasonable under the circumstances.

As the Supreme Court has previously explained, when determining the reasonableness of an attorney's fee, the court should look to the following factors:

1. The time devoted to performing the legal service.

2. The time limitations imposed by the circumstances.

3. The novelty and difficulty of the questions involved and the skill requisite to

perform the legal service properly.

4. The fee customarily charged in the locality for similar legal services.

5. The amount involved and the results obtained.

6. The experience, reputation, and ability of the lawyer performing the legal service.

Connors v. Connors, 594 S.W.2d 672, 676 (Tenn. 1980)(citing Supreme Court Rule 38, Code of Professional Responsibility, D.R. 2-106).

The Trial Court did not make any findings regarding the above factors. The Court also pretermitted any discussion of the fact that the deceased did not continue representing the defendant until the objective of obtaining a landfill permit had come to pass. Nor did the expert take this into account in giving his opinion. On cross examination of the expert, the following transpired:

Q. If the facts of the case were that the relationship between Mr. Fetterman and Mr. King had been terminated and that Mr. Fetterman came back in as local counsel for the lawsuit at the time that Mr. Dillard came on the case and Mr. Overbey, and that whole process started, how would that affect your assessment of the reasonableness of the 20 percent fee?

A. I have no knowledge of the relationship, direct relationship between Mr. King and Mr. Fetterman and no knowledge as to whether that relationship ended on a good note or a bad note. I don't know. I mean, obviously we're in litigation now. You know, I did note that, at least with reference to the lawsuit that you've mentioned, that from the files, it appears Mr. Fetterman was actively involved in the lawsuit that was filed in Scott County.

Q. I'm not saying that he was. I'm saying that he came back on board, so to speak, with that lawsuit as local counsel.

. . .

Q. In testimony we've had before this Court, he became a full-time public defender in 1992, so taking into consideration that he was probably five years in practice at the most when he was involved in the case with Dillard and that he was also, I guess by the statute, not permitted to be in private practice, although I'm not sure it was legal to have finished up litigation that he had ongoing at the time that he accepted that appointment, would those factors weigh in your assessment of how much time he spent or could spend on this case?

A. Of course if he was working elsewhere full time in a full-time position, that also would be a factor. When did he become public defender, '92?

Q. 1992, according to his daughter's testimony.

A. Ah-huh.

Q. Do you know of his involvement with a land development subdivision during this period of time?

A. No.

King's brief questions whether Fetterman's contract with King violated Tennessee disciplinary rules, specifically, the rule previously known as DR 5-103, which stated:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for a client, except that the lawyer may:
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> (1) Acquire a lien granted by law to secure the lawyer's fee or expenses.
> (2) Contract with a client for a reasonable contingent fee in a civil case.

The Estate counters that the contract is a type of contingency fee agreement, since Fetterman would be entitled to nothing if the corporation had never been created. However, the contract goes beyond a normal contingency fee agreement, and involves a proprietary interest in the subject matter, since Fetterman was granted ownership of a part of the company, and not just a percentage of the sale price, e.g., if the company had not been sold and King was operating the same at a profit, the Estate would obviously argue that it was entitled to its pro rata share based on the 20% ownership interest.

Other states which have examined fee agreements which convey an equity interest in the client's business in lieu of a traditional attorney's fee have found that such agreements are not unethical per se, but that the applicable disciplinary rules must be fully complied with before such an agreement can be enforced. *See Utah Ethics Op.* 98-13, 1998 WL 863904 (Utah State Bar Dec. 4, 1998); *NYC Ethics Op.* 2000-3, 2000 WL 33769162 (NYC Assn. B. Comm. Prof. Jud. Eth. July 18, 2000); *PA Ethics Op.* 01-100, 2001 WL 1744773 (Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. March 16, 2001). The consensus regarding such agreements is that they may be upheld as a type of contingency fee agreement, providing that the attorney made a full disclosure to the client of the potential conflict of interest and the risk involved with the same, that the client consented to such conflict in writing, that the client had the opportunity to receive independent legal advice, and that the value given was a reasonable fee. *Id., see also Bauermeister v. McReynolds*, 571 N.W.2d 79 (Neb. 1997); *Holmes v. Loveless*, 2004 WL 1546772 (Wash. Ct. App. July 12, 2004). There is no

evidence in this record of a full disclosure and such assent.

However, the contract was enforced, even though Fetterman had withdrawn from representing King prior to the formulation and sale of the corporation, which is a more compelling reason not to enforce the contract.

This case is factually similar to the case of *Madison Tire Co., Inc. v. Weaver*, 1986 WL 12493 (Tenn. Ct. App. Nov. 7, 1986). In *Madison*, the attorney who originally filed suit on the plaintiff's behalf (and did discovery and other extensive work on the case) had a contingency fee agreement with the client for 36% of any recovery. *Id*. Prior to the case going to trial, the attorney closed his law practice and moved to another city, which necessitated the association of a new lawyer to finish prosecuting the action. *Id*. The original attorney never withdrew as attorney of record, but apparently did no further work on the case after his relocation. *Id*. When the plaintiff later obtained a judgment, the original attorney filed a notice of attorney's fee lien, which the trial court denied. *Id*.

On appeal, this Court stated "an attorney is entitled to compensation in accordance with the contract of employment. Where he has abandoned the contract, under certain circumstances, he should be paid on a quantum meruit basis." *Id*. The Court relied upon the Supreme Court's opinion in *Crawford v. Logan*, 656 S.W.2d 360 (Tenn. 1983). We held that the original attorney who "abandoned the contract" would be entitled to be paid on a quantum meruit basis for his work, and remanded the case to the trial court for a determination of the time spent by the attorney and the reasonable value of his services. *Id*. *Also see: Johnson v. Hunter*, 1999 WL 1072562 (Tenn. Ct. App.).

In this case, Fetterman went to work for the Public Defender's office on a full-time basis several years before the formation and sale of King's corporation. Thus, Fetterman did not fully perform his part of the contract regarding his representation of the plaintiff, and on the above authority, the Estate should recover the lesser of the contract value or a fee based on quantum meruit. Accordingly, we conclude that the Judgment of the Trial Court should be vacated and the cause remanded, to establish a fee for Fetterman's Estate, based upon quantum meruit, which fee will be established on the value of the benefit conferred to the client, rather than the value of the services to the attorney who performed them. *See, Castelli v. Lien*, 910 S.W.2d 420, 428 (Tenn. Ct. App. 1995).

After the Trial Court entered Judgment, King appealed to this Court, and before the Court acted upon the Appeal, on Motion of King the matter was remanded to the Trial Court to rule on King's Tenn. R. Civ. P. Rule 60.02 Motion.

King argues that the Trial Court, on remand, abused its discretion in not granting King's Tenn. R. Civ. P. Rule 60.02 Motion by failing to order a new trial. King's Motion was based on newly discovered witnesses who would testify that Fetterman told them he would be receiving a fee of $250,000.00 from King. The Court denied the Motion without making any specific findings, but allowed King's attorney to make an offer of proof.

King admits that to prevail on this issue, he must show that the newly discovered evidence was not merely cumulative. A review of the offer of proof, demonstrates that the testimony of the witness was indeed cumulative of the testimony of two other witnesses that had testified at trial, i.e., Fetterman had told the witness he would be receiving a $250,000.00 fee from King, but did not specifically state that he intended to extinguish the prior 20% agreement.

The testimony of another witness seems to bolster King's argument regarding a novation, but to prevail on his Rule 60 motion, King was required to show that this "newly discovered" evidence was not reasonably discoverable before trial by the exercise of due diligence. *Painter v. Toyo Kogyo of Japan*, 682 S.W.2d 944 (Tenn. Ct. App. 1984). In this case there has been no showing, by affidavit or otherwise, of due diligence on the part of King or his counsel in discovering this evidence. The witness Jeffers was Fetterman's long-time friend and CPA, and the witness testified that they had an ongoing business relationship, and he prepared Fetterman's annual tax returns. Further, he testified that he was asked to testify after being contacted by King's counsel and questioned about his knowledge on the eve of the hearing.

Tenn. R. Civ. P. 60 is "not for use by a party that is merely dissatisfied with the results of his case." *NCNB Nat. Bank of North Carolina v. Thrailkill*, 856 S.W.2d 150, 153 (Tenn. Ct. App. 1993). Rather, it is an "escape valve" not easily opened, and is "intended to provide relief only in the most unique, exceptional, or extraordinary circumstances." *Id*. at 154. No such circumstances have been established in this case. Accordingly, the Trial Court did not abuse its discretion in denying the motion, or in refusing to hear the proffered evidence after the same was described at length by counsel. The issue is without merit.

Finally, the Estate argues on appeal that the ultimate calculation of interest by the Trial Court was unfair. However, we pretermit this issue because we have vacated the entire Judgment of the Trial Court.

The Judgment of the Trial Court is vacated and the cause remanded to the Trial Court for a new trial to establish the quantum meruit value of the deceased attorney's services, and enter a Judgment for the Estate.

The cost of the appeal is assessed one-half to the Estate of Fetterman, and one-half to Johnny King.

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HERSCHEL PICKENS FRANKS, P.J.